A

LAU JIN HENG REALTY SDN BHD

v.

GEOTECHNIQUE EAST (M) SDN BHD

B

HIGH COURT SABAH & SARAWAK, KUCHING
DAVID WONG DAK WAH JC
[CIVIL APPEAL NO: 11-09-2006-III]
15 FEBRUARY 2007

C ***CIVIL PROCEDURE:*** *Appeal - Facts, finding of - Decision of magistrate - Whether magistrate had erred in law and fact - Whether magistrate's decision so unreasonable that no reasonable tribunal would come to the same conclusion*

D This was an appeal by the defendant/appellant against the magistrate's decision where he gave judgment to the plaintiff/ respondent in the sum of RM10,600 together with interests thereon at the rate of 2% per month from 19 October 1997 until the full settlement of the judgment sum. The amount claimed was
E for fees in respect of a second soil test conducted by the plaintiff. The issues that arose were (i) whether the magistrate had erred in law and fact when he found that the second soil test was done pursuant to the instruction of the appellant and (ii) whether the magistrate had erred in law in awarding 2% per month on the sum
F of RM10,600 from 19 October 1997 until the full settlement of the aforesaid sum.

Held (dismissing the appeal):

(1) This appeal concerned a finding of fact by the magistrate and
G in such circumstances the law is that an appellate court should be slow in disturbing finding of facts by the trial judge unless the decision was so unreasonable that no reasonable tribunal would have come to that conclusion. (para 2)

H **(2)** The magistrate had come to the conclusion that the second soil test was done pursuant to the defendant's instruction. He had based his conclusion on documentary evidences tendered in court. Those documentary challenges were not challenged. Further, the consultant had accepted the second soil test
I without any complaints to the defendant. The defendant's defense may have had some merit had they called the

consultant as a witness. This was not done which only showed that the defense was merely a bare assertion. In respect of the defendant's assertion that the plaintiff ought to have sued the main contractor, the magistrate was correct to conclude that the facts did not allow him to come to that conclusion. Accordingly, the magistrate's decision was not unreasonable that no reasonable tribunal would have to come to that conclusion. It was a well reasoned decision. (paras 3 & 4)

(3) The defendant had raised no objection to the invoice and as such could not deny their liability to pay the interests imposed. Debtors must realize that when creditors are deprived of the money rightfully due to them they too suffer as they incurred interests from their overdraft accounts. (para 5)

Case(s) referred to:

APV Hill & Mills Sdn Bhd v. AQ-Pacific Wide Sdn Bhd & Anor [2006] 1 CLJ 370 CA ***(refd)***

Ching Yuen Tung v. Bep Akettik [1978] 1 MLJ 211 ***(refd)***

Gan Yook Chin & Anor v. Lee Ing Chin & Or [2004] 4 CLJ 309 FC ***(refd)***

Low Cheng Soon v. TA Securities Sdn Bhd [2003] 1 CLJ 309 CA ***(refd)***

Tansa Enterprise Sdn Bhd v. Temenang Engineering Sdn Bhd [1994] 1 LNS 160 ***(refd)***

For the appellant - Ivan Hussien; M/s Ivan Hussien
For the respondent - Wejok Tomik; M/s Reddi & Co

Reported by Suhainah Wahiduddin

JUDGMENT

David Wong Dak Wah JC:

[1] Before me is an appeal by the defendant/appellant (appellant) against the learned Magistrate's decision dated 5 November 2004 after a full trial, where he gave judgment to the plaintiff/respondent(respondent) in the sum of RM10,600 together with interests thereon at the rate of 2% per month from 19 October 1997 until the full settlement of the judgment sum. The amount claimed was for fees in respect of a second soil test conducted by the plaintiff.

[2] Counsel for the appellant, Mr. Ivan Hussien (Encik Hussien) in substance submitted two grounds for my consideration and they are:

1. The learned Magistrate erred in law and fact when he found that the second soil test was done pursuant to the instruction of the appellant.

2. The learned Magistrate erred in law in awarding 2% per month on the sum of RM10,600 from 19 October 1997 until the full settlement of the aforesaid sum.

At the start of the hearing of this appeal, learned counsel for the respondent, Mr. Wejok Tomik (Mr. Tomik) raised a preliminary objection to this appeal which relates to the failure of the appellant's counsel's failure to include exhs. P23(a)-(k) and P24(a) -(w) in the record of appeal and relied on the case of *Low Cheng Soon v. TA Securities Sdn. Bhd.* [2003] 1 CLJ 309 where the Court of Appeal held:

> In our judgment, the importance of the Rules of Court cannot be ignored as otherwise the courts will be faced with endless problems involving the administration of justice. Speaking of the importance of the Rules of Court, the learned judge, Chang Min Tat J (as he then was) in *Yu Oi Yong & Anor v. Ho Toong Peng & Ors* [1977] 1 MLJ 120 had this to say (at p. 121):
>
> There should, in my view, be some adherence to the rules of court, unless required by circumstances, if there is to be any meaning or purpose in such rules.
>
> It should, I think, be realized by practitioners as well as by judges that while strict and slavish adherence to forms and rules can sometimes hinder the administration of justice, these forms and rules should not be disregarded for no reason whatsoever, since they embody the experience of the courts over the years in the cause of speedy and efficient administration of justice …
>
> … Coming back to the instant appeal before us and for the reasons we have already mentioned earlier we would uphold the preliminary objection. We do so not because there is mere non-compliance with the Rules but rather because of the consequence which resulted from such non-compliance ie, **a huge chunk of exhibits have been left out of the Appeal Record.** Despite being informed by learned counsel for the respondent of his objection the appellant showed no response, an attitude which in

> our opinion amounted to a blatant disregard for the Rules. There was also no attempt made by the appellant to apply for leave to file a Supplementary Appeal Record. Such application, if made would have easily met our approval.
>
> Unfortunately nothing was done. We would therefore conclude that this appeal is not properly brought before us and on that finding we dismiss it with costs and order that the deposit be paid to the respondent to account of its taxed costs.

The dicta of the just quoted case are binding on me and if the preliminary objection was pursued I may be forced to strike out the appeal. However to the credit of Mr. Tomik, he informed the court that if Encik Hussien undertook to file a supplementary record of appeal, he would not pursue his preliminary objection and would let the court to look at the merits of the appeal. The conduct of Mr. Tomik must be commended as these days such conduct are far and few in between. Encik Hussien had since filed in the supplementary record of appeal.

I now look at the substance of the appeal. Before I look at the two grounds set out earlier, I am of the view that this appeal concerns a finding of fact by the learned Magistrate and in such circumstances, the law is that an appellate court should be slow in disturbing finding of facts by the trial judge unless the decision is so unreasonable that no reasonable tribunal would have come to that conclusion. (See *APV Hill & Mills Sdn. Bhd. v. AQ-Pacific Wide Sdn Bhd & Anor* [2006] 1 CLJ 370) or was plainly wrong (see *Gan Yook Chin & Anor v. Lee Ing Chin & Or* [2004] 4 CLJ 309).

So the question which I need to address is whether or not the learned Magistrate had made such a decision.

[3] In respect of ground 1, the learned Magistrate had at p. 97-101 of the Record of Appeal dealt with it and came to the conclusion that the 2nd soil test was done pursuant to the defendant's instruction. He based his conclusion on documentary evidences tendered in court. Those documentary evidences were not challenged and had the learned Magistrate not taken them into consideration, he would have failed in his duty to judiciously evaluate the evidences before him. Further the consultant had accepted the second soil test without any complaints to the defendant. The defendant's defense may have some merit had they

called the consultant as a witness. This was not done which only shows that the defense was merely a bare assertion. In respect of the defendant's assertion that the plaintiff ought to have sued the main contractor, the learned Magistrate was correct to conclude that the facts did not allow him to come to that conclusion and rightly relied on the case of *Ching Yuen Tung v. Bep Akettik* [1978] 1 MLJ 211. He was also correct to conclude that this was not pleaded in the defense.

[4] Accordingly and after also having carefully scrutinized the record of appeal, I do not find that the learned Magistrate's decision was so unreasonable that no reasonable tribunal would have come to that conclusion. In fact it was a well reasoned decision.

In respect of ground 2, suffice for me only to refer to the case of *Tansa Enterprise Sdn Bhd v. Temenang Engineering Sdn Bhd* [1994] 1 LNS 160 where Haidar J (as he then was) said:

> In respect of the claim of interest of 1.5% per month for overdue accounts by the plaintiff the defendant cannot deny this claim as it has full knowledge of this as clearly indicated in the invoices submitted to it by the plaintiff and there was no protest of this claim at all when the invoices were presented to the defendant. I am therefore of the view that the plaintiff is entitled to claim such interest. lt is similarly not a triable issue at all.

[5] Similarly here, the defendant raised no objection to the invoice and as such cannot now deny their liability to pay the interests imposed. Debtors must realize that when creditors are deprived of the money rightfully due to them they too suffer as they incur interests from their overdraft accounts.

Accordingly, this appeal is dismissed with costs to be taxed unless agreed to the respondent.